



## DEPARTMENT OF THE CORPORATION COUNSEL

Carrie K.S. Okinaga, Corporation Counsel  
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### POWERS, DUTIES AND FUNCTIONS

The Corporation Counsel serves as the chief legal advisor and legal representative of all agencies, the City Council and all officers and employees in matters relating to their official powers and duties, and shall represent the City in all legal proceedings and shall perform all other services incident to the office as may be required by the Charter or by law.

### ORGANIZATION OF DEPARTMENT

The Department of the Corporation Counsel is organized into the Administration Division and three other divisions, namely:

1. Counseling and Drafting
2. Litigation
3. Real Property Tax

### COUNSELING AND DRAFTING DIVISION

The Counseling and Drafting Division is comprised of 26 attorneys: a division head and 25 Deputies Corporation Counsel. The division is supported by 12 support staff, including three paralegal assistants and seven legal clerks. The division performs the function of legal advisor to all the City agencies, the City boards and commissions, and the City Council and its Committees. In this advisory function, the division is responsible for rendering oral and written opinions to all of the entities it advises, for drafting bills and resolutions for submission to the City Council or the State legislature, for reviewing and approving legal documents to which the City is a signatory, and for attending all the meetings of the City Council, the Council Committees, and the City boards and commissions.

The division performs the legal representation function, representing City agencies, in City and State administrative proceedings. The division also performs the legal representation function in selected court proceedings such as eminent domain proceedings, quiet title, partitions of land court property, administrative appeals, foreclosures, bankruptcy, interpleader actions for the return of seized property and other matters as may be specially assigned.

### Statistics

For the fiscal year July 2008 to June 2009, the division commenced the year with 4,150 outstanding opinion requests, thereafter received 1,118 requests, and completed and closed 3,455 requests, thus having a workload of 5,268 requests during the year. The year was closed with a total of 1,813 outstanding opinion requests.

The division commenced the year with 63 outstanding drafting requests (i.e. requests to draft bills, resolutions, leases, easements, contracts, affidavits, etc.), thereafter received 204 requests, and completed and closed 220 requests, thus having a workload of 267 requests during the year. The year was closed with a total of 47 outstanding drafting requests.

The division commenced the year with 715 outstanding requests for review and approval of legal documents, thereafter received 5,035 requests, and completed and closed 5,081 requests, thus having a workload of 5,750 requests during the year. The year was closed with a total of 669 outstanding requests for review and approval of legal documents.

The division commenced the year with 351 outstanding pre-suit cases (i.e. adversarial proceedings pending before administrative bodies), thereafter received 65 requests, completed and closed 63 requests, had a workload of 416 cases during the year. The year was closed with a total of 353 outstanding requests. The division commenced the year with 515 outstanding case assignments (i.e. cases in any of the state or federal courts), thereafter received 137 requests, and completed and closed 127 requests, thus having a workload of 652 cases during the year. The year was closed with a total of 525 outstanding case assignments.

### Community Services Section

Sale of Aalapapa Drive Property. The division assisted the Elderly Affairs Division of the City's Department of Community Services ("EAD") in consummating the sale of a residential property on Aalapapa Drive in Kailua. The property had been bequeathed to the City by an elderly woman in gratitude for services received from EAD. For many years it has been EAD's goal to sell the property and to comply with the terms of the bequest by using the proceeds to fund further services to the elderly. In prior years the division has assisted EAD's efforts to renovate the property with federal Community Development Block Grant funds, to use the property as a home for Section 8 rental assistance eligible families, to obtain Council approval for sale of the property, to negotiate a listing agreement with a broker and to negotiate the terms of the sale. This year the division was able to clear the way for consummation of the sale by resolving certain title problems in a Land Court proceeding, which also entailed advocating the position that the Land Court not re-evaluate the decision of the Probate Court in giving effect to the original bequest. Bringing this long-standing project to a conclusion has made it possible for EAD to use the more than \$1 million in proceeds from the sale for enhanced services to the elderly. (Gordon D. Nelson)

Transfer of Kawainui Marsh. The division provided legal support to finalize the transfer of Kawainui Marsh from the City to the State, following years of negotiation and legislation. The transfer placed Kawainui Marsh under the stewardship of the State Department of Land and Natural Resources, and enabled the State to secure federal funding for a major wetland habitat restoration project. (Kathleen A. Kelly)

Residential Condominium Lease-to-Fee Conversion. The division is involved in two lawsuits arising out of the repeal of the City's residential condominium lease-to-fee ordinance, Revised Ordinances of Honolulu Chapter 38, by the enactment of Ordinance No. 05-001. Condominium unit lessees in the Discovery Bay and Admiral Thomas condominiums have sued the City for their inability to proceed with the conversion of their leasehold condominium units. The City received favorable decisions from the United States District Court on our motions for summary judgment. The decisions have been appealed to the United States Court of Appeals for the Ninth Circuit. The City will continue to vigorously defend these cases.

Young v. City and County of Honolulu, \_\_\_ F. Supp. 2d. \_\_\_ (2009), Civil No. 07-00068 JMS/LEK, U.S. District Court for the District of Hawaii. (Admiral Thomas condominium) The division received a favorable decision in April 2009 from United States District Court Judge J. Michael Seabright in this lawsuit by several condominium unit lessees of the Admiral Thomas condominium. The Court granted summary judgment in favor of the City on all federal claims, and refused to take jurisdiction over the state claims. All claims against the City were dismissed by the Court, without prejudice to filing lessees' breach of contract claims against the City in state court.

The condominium unit lessees sued the City for failure to acquire and convey the leased fee interests in their apartments pursuant to Chapter 38. In this case, six condominium unit lessees were denied the opportunity to join (add-on) in a pending condemnation proceeding instituted on behalf of a number of other Admiral Thomas lessees who had already begun the lease-to-fee condemnation conversion process. The City was unable to add the six lessees following the repeal of Chapter 38 by Ordinance No. 05-001. The lessees claimed that this inability to add them on adversely impacted the pending condemnation case, because the condemnation case was ultimately dismissed due to the lack of the required minimum number of lessees (25) under Chapter 38, claiming that had the City implemented their contracts for condominium conversion and added them to the pending condemnation case, there would have been sufficient numbers to maintain the suit. The lessees claimed that the repeal of Chapter 38 as to them was a constitutional violation under the Contract Clause of the United States Constitution, which provides that no state shall pass any law impairing the obligation of contracts, and the lessees also sued the City for breach of contract. The City argued in response that the contracts were conditioned upon the "successful acquisition of the property" and that the City Council had the legislative prerogative to repeal the law and find that mandatory leasehold conversion is no longer an appropriate public use for the exercise of the City's power of eminent domain. (Don S. Kitaoka, Brad T. Saito, Jesse K. Souki, Kyle K. Chang)

Barr v. City and County of Honolulu, \_\_\_ F. Supp. 2d \_\_\_ (2009), Civil No. 05-00125 DAE-LEK, U.S. District Court for the District of Hawaii. (Discovery Bay condominium) The Division received a favorable decision in July 2009 from United States District Court Judge David A. Ezra in this lawsuit by several condominium unit lessees of the Discovery Bay condominium. The Court granted summary judgment in favor of the City on all federal claims, and declined to take jurisdiction over the state claims in the lawsuit. All claims against the City were dismissed by the Court, without prejudice to the filing lessees' breach of contract claims against the City in state court.

Several Discovery Bay condominium unit lessees sued the City for failure to acquire and convey the leased-fee interests in their apartments pursuant to Chapter 38. The lessees claimed that the repeal of Chapter 38 as to them was a constitutional violation under the Contract Clause of the United States Constitution, which provides that no state shall pass any law impairing the obligation of contracts, and lessees also sued the City for breach of contract. The City argued, and both Judge Seabright and Judge Ezra agreed, that the contracts were contingent upon the City Council determining that a public purpose necessitated the taking of the property and voting to adopt a resolution of condemnation. The City argued that the contracts were expressly conditioned upon the "successful acquisition of the property" and the City Council had the legislative prerogative to repeal the law and find that mandatory leasehold conversion was no longer an appropriate public purpose for the exercise of the City's power of eminent domain. (Don S. Kitaoka, Brad T. Saito, Jesse K. Souki, Kyle K. Chang)

## **FINANCE SECTION**

Attachmate. The division assisted the Department of Information Technology with resolution of a software license compliance issue. The division successfully negotiated a potential \$250,000+ liability claim into an \$80,000 license purchase that resolved all outstanding license issues. (Geoffrey M. Kam)

Spay/Neuter Contract. The division assisted the Department of Customer Services ("CSD") and the Purchasing Division of the Department of Budget and Fiscal Services ("Purchasing") with issues related to the City's Spay/Neuter Contract. Pursuant to ROH Section 7-5.1, the City is authorized to establish a clinic, through a fee-for-service contract, at which members of the public may have dogs and cats spayed or neutered in a humane manner. The division advised CSD and Purchasing on issues relating to contract formation with one vendor, difficulties in administration of the contract ultimately leading to termination of the contract, and the procurement and contracting of a new vendor. (Geoffrey M. Kam)

Ethics Commission Contested Case Hearing Regarding Retention of Witness Fees. The division assisted the Ethics Commission in its hearing on whether a City employee's retention of witness fees when the employee does not actually testify in a litigation matter violated Revised Charter of the City and County of Honolulu ("RCH") Section 11-104 (Improper use of official position to obtain special consideration, treatment, advantage, privilege or exemption) and RCH Section 11-102(d) (Receipt of compensation for services as an officer or employee of the City from any source other than the City). The Commission determined that there was a violation of RCH Section 11-102(d), but no violation of RCH Section 11-104; the division assisted with preparation of what ultimately became the Commission's Advisory Opinion 2009-3. (Geoffrey M. Kam)

Act 10 Implementation. The division assisted the Department of Human Resources (“DHR”) and the Purchasing Division of the Department of Budget and Fiscal Services (“Purchasing”) with implementation of Act 10 (2008 First Special Session). The Act implements the recommendations of the December 2007 report of the Hawaii identity theft task force to protect the security of personal information collected and maintained by state and county government agencies. The division, with input from DHR, assisted Purchasing with developing form contract language designed to implement Section 8 of the Act. The division also assisted DHR with documents intended to assist other City departments with their compliance with other sections of the Act. (Geoffrey M. Kam)

HSBA Mid-Year Conference. The division coordinated with the Real Property Tax Division and the Real Property Assessment Division of the Department of Budget and Fiscal Services to develop and present a seminar relating to the proper procedures and filing real property tax appeals for the Hawaii State Bar Association’s Mid-Year Conference. The presentation covered the appraisal and assessment process and the procedures for filing real property tax appeals to the Boards of Review and the Tax Appeals Court. (Ryan H. Ota)

Deferred Compensation Committee. The division serves as legal counsel to the City’s Deferred Compensation Committee. The Committee oversees the City’s \$340 million Deferred Compensation Program which allows employees to contribute to a defined contribution plan for their retirement. The National Association of Deferred Compensation Government Administrators, the preeminent association of defined contribution and deferred compensation administrators from 50 states and over a 100 municipalities, has recognized the City’s Save for Retirement Week Campaign and will present the Committee with a 2009 Leadership Recognition Award at the annual conference in Austin, Texas. (Ryan H. Ota)

Budget and Fiscal Services Fee Manual. The division assisted the Department of Budget and Fiscal Services in revising its Manual of User Fees and Charges. The previous revision was over 25 years ago and many of the ordinances and fees had been revised. The division coordinated the research with each City department that assesses user fees and/or charges to ensure that the manual was thoroughly updated. The manual is currently being updated and revised for changes in fees and/or charges with the division’s assistance. (Ryan H. Ota)

## **INFRASTRUCTURE SECTION**

State Legislation Relating to County Liability. Our efforts in the 2009 state legislative session were directed in seeking repeal of the sunset dates of Act 170, Session Laws of Hawaii 2002, and Act 82, Session Laws of Hawaii 2003. Act 170 provides liability protection for lifeguard services on the beach or in the ocean except for acts of gross negligence or wanton acts or omissions. Act 82 provides limited liability protection for the State and the counties for incidents arising on improved public lands, provided that certain signage requirements are met. Both Acts were scheduled to sunset in 2010. The division assisted with the coordination of the City’s efforts, the coordination of efforts among the counties, drafting proposed language for the legislation, and meeting with state legislators to share the concerns of the City regarding the provisions of the pending bills seeking to amend Acts 170 and 82. We were pleased to have Act 081 signed into law by Governor Lingle on June 1, 2009. Act 081 extends the immunity protection afforded by Acts 170 and 82 to 2014. (Dawn D. M. Spurlin)

Waimanalo Gulch Sanitary Landfill. The division assisted the Department of Environmental Services (“ENV”) in its applications for a special use permit (“SUP”) and a land use district boundary amendment (“DBA”) for the Waimanalo Gulch Sanitary Landfill (“WGSL”), the City’s only municipal solid waste landfill. Both applications seek to use the remaining capacity of the WGSL, consistent with the City Council’s selection in December 2004 of Waimanalo Gulch as the location of the future municipal solid waste landfill.

On December 2, 2008, ENV filed a petition for a DBA for the approximately 200-acre property with the State of Hawaii Land Use Commission (“LUC”). The LUC granted intervenor status to three parties in the DBA application proceedings; the matter is currently being conducted as a contested case hearing. The division continues to represent ENV in this on-going matter.

On December 3, 2008, ENV submitted an application for an SUP for the approximately 200-acre property with the City Planning Commission, which application is ultimately approved by the LUC. The Planning Commission granted intervenor status to three parties in the permit application proceedings; the matter was thus conducted as a contested case hearing. The Planning Commission denied intervention to Councilmember Todd K. Apo. The division represented ENV throughout the application process, including the contested case hearing, held on June 22, 2009, June 24, 2009, July 1, 2009, July 2, 2009, and July 8, 2009. The Planning Commission approved the requested SUP on July 31, 2009. The division will continue to provide legal representation to ENV through the next stage of proceedings before the LUC.

Related to the SUP and DBA are two judicial matters. The first is an agency appeal filed by Councilmember Apo on June 18, 2009, in the First Circuit Court, State of Hawaii (Civil No. 09-1-1394-06 (EEH)). Councilmember Apo is suing the Planning Commission and ENV for the Planning Commission’s decision denying his application for intervention. By order dated June 19, 2009, the Court denied Councilmember Apo’s motion for an emergency stay of the SUP proceedings. The second matter is a complaint filed by Colleen Hanabusa on December 11, 2008, in the First Circuit Court, State of Hawaii (Civil No. 08-1-2562-12 (GJK)), regarding the environmental impact statement filed for the SUP and the DBA. The division will continue to provide legal representation to ENV through the next stages of these proceedings. (Gary Y. Takeuchi, Jesse K. Souki, Sharon Lam Blanchard)

The Infrastructure Section, with the assistance of special deputy corporation counsel, has provided legal support pertaining to various enforcement and litigation matters involving the City’s wastewater system, which are summarized in greater detail below.

Sierra Club, Hawaii Chapter, et al. v. City and County of Honolulu, et al., Civil No. 04-00463 DAE-BMK, U.S. District Court for the District of Hawaii. The division continued to vigorously defend the pending federal district court lawsuit filed in July 2004 by Plaintiffs Sierra Club, Hawaii Chapter, Hawaii’s Thousand Friends and Our Children’s Earth Foundation against the City, which is based on alleged Clean Water Act violations arising from the City’s wastewater collection and treatment system. The division also negotiated with Plaintiffs to obtain a stay of the litigation for a limited period of time so that the parties could see if there were areas where the parties could reach agreement. (Kathleen A. Kelly)

Compliance Support. The division continued to advise and support the Department of Environmental Services regarding various regulatory obligations, including:

- The 1995 Consent Decree entered in United States of America, et al. v. City and County of Honolulu, which contained requirements for sewer maintenance and repair, the City's pretreatment program, effluent and sludge reuse, and substantial capital improvements.
- The 2007 Stipulated Order entered in United States of America, et al. v. City and County of Honolulu, Civil No. 07-00235 DAE-KSC, U.S. District Court for the District of Hawaii, which requires the City to evaluate, repair, rehabilitate or replace certain force mains and one pump station in its wastewater collection system and develop site-specific spill contingency plans.
- NPDES Permits and administrative orders relating to the City's wastewater treatment plants and appurtenant collection systems.
- Efforts to work with the Environmental Protection Agency and the Department of Health to reach an agreement over comprehensive requirements for the City's wastewater system. (Kathleen A. Kelly)

Applications for Renewed 301(h) Waivers for the Sand Island and Honouliuli Wastewater Treatment Plants. The division provided legal support for the City's appeal of final decisions by the Environmental Protection Agency ("EPA") to deny applications for a renewed variance from secondary treatment for the Honouliuli and Sand Island Wastewater Treatment Plants. The Infrastructure Section assisted with the development of petitions for review before the Environmental Appeals Board that were submitted in February and March of 2009, respectively. The division also represented the City in two Freedom of Information Act lawsuits against the EPA, to require the EPA to disclose documents relating to its tentative and final decisions. (Kathleen A. Kelly)

Legislative Updates to the State Water Quality Standards. The division provided advice and legal support in preparing and supporting legislative updates to the State water quality standards, to more accurately reflect criteria protective of human health and the environment. The division worked with the Hawaii State Department of Health and the Legislature to secure passage of Act 126 (2009). (Kathleen A. Kelly)

## **LAND USE SECTION**

Nuuanu Valley Association v. City and County of Honolulu, 119 Hawai'i 90, 194 P.3d 531 (2008). The division received a favorable decision from the Hawaii Supreme Court in litigation involving a proposed residential subdivision in Nuuanu Valley. The suit was initiated by homeowners and residents who reside in Nuuanu Valley. The development was proposed by Laumaka, LLC. The Hawaii Supreme Court decision is significant in its determination on two specific issues. First, the Court ruled that the Hawaii Environmental Policy Act, Hawaii Revised Statutes Chapter 343, is not triggered as a "use of state or county lands" where drainage and sewer lines merely connect to the City's drainage system and sewer lines, without requiring construction or tunneling beneath state or county lands. Second, as to engineering reports submitted by the developer to the City's Department of Planning and Permitting in support of its application for development permits, the Court ruled that reports that have not been accepted by the department are not subject to disclosure under the Uniform Information Practices Act, Hawaii Revised Statutes Chapter 92F, because such reports do not constitute "government records" prior to their acceptance by the department. The Court affirmed the department's practice of withholding disclosure of the engineering reports and the department's comments thereon, prior to the acceptance of the reports by the department. Plaintiff's motion for reconsideration of the Supreme Court decision was denied. (Don S. Kitaoka)

Unite Here! Local 5 v. City and County of Honolulu, 120 Hawai'i 457, 209 P.3d 1271 (2009). The division received a favorable decision from the State Intermediate Court of Appeals in May 2009 that affirmed the Circuit Court's ruling that a supplemental Environmental Impact Statement ("EIS") was not required for the proposed expansion of the Kuilima Resort. This was an appeal filed by Keep the North Shore Country and the Sierra Club, Hawaii Chapter. The Court adopted the City's position that under Hawaii Administrative Rules Section 11-200-26 that implements the State Environmental Policy Act, Hawaii Revised Statutes Chapter 343, the department is required to conduct a two-step inquiry to determine whether a supplemental EIS is required: asking first whether the action (the project) has changed substantively in size, scope, intensity, use, location or timing, and if so, asking second whether the change in any of these characteristics will likely have a significant effect and result in individual or cumulative impacts not disclosed in the original EIS. The City's position adopted by the Court was that no further inquiry is necessary if the response to the first question is in the negative. If the response to the first question is in the affirmative, only then is further analysis required to determine whether the change will likely have a significant effect and result in individual or cumulative impacts not disclosed in the original EIS. Here, the Court determined that the Plaintiffs did not establish that the project changed substantively. The time for filing a writ of certiorari to the Hawaii Supreme Court has not yet expired at the time of the preparation of this report. (Don S. Kitaoka)

City and County of Honolulu v. Loida B. Santos, et al., Civil No. 08-1-2467-11 (BIA), First Circuit Court, State of Hawaii. The division assisted the City Department of Planning and Permitting ("DPP") in obtaining a Temporary Restraining Order to authorize the City to enter the property located at 1732 Gulick Avenue in order to demolish the remains of an unpermitted, partially collapsed, scaffolding and tarpaulin structure which fell under the weight of heavy rains in October 2008.

Earlier DPP had identified several violations of the City's Building Code and Land Use Ordinance at the 1732 Gulick Avenue property and issued administrative citations to the property owners ordering them to remove the unpermitted structure and subsequently imposed daily civil fines for their failure to correct the violations. Thereafter the division assisted DPP with the issuance of demand letters to correct the violations and pay the accumulated civil fines. The division prepared to initiate foreclosure proceedings against the property for the property owners' failure to act when heavy rains caused the structure to collapse and necessitated more immediate action on behalf of DPP.

The division thereafter initiated legal proceedings against the property owners and successfully obtained a court order authorizing the City to enter onto the private property to demolish the remnants of the structure and dispose of waste on the property at the property owners' expense after efforts to negotiate removal of the collapsed structure with the property owners failed. The division



also sought a permanent injunction against the property owners to order them to take corrective actions against the partially collapsed structure and other violations on the property but the request was obviated by the voluntary action of the property owners to demolish the remnants of the structure, dispose of the waste on the property and correct the remaining violations at their own expense. (Brad T. Saito, Don S. Kitaoka)

Fire Damaged Structure in Waipahu. The division assisted the Department of Planning and Permitting (“DPP”) in obtaining compliance of the owners of a Waipahu property who were ordered to demolish the remains of an abandoned, fire-damaged structure and remove waste materials and other debris from the property. The fire-damaged structure remained on the property causing community complaints notwithstanding DPP’s issuance of administrative citations and the imposition of daily civil fines for the failure to remove the structure. Subsequently the division assisted DPP with its issuance of a notice of unsafe building that declared the structure a public nuisance and hazardous to human health and ordered the property owners to demolish the structure and abate the unsafe conditions occurring on the property within 90 days. The property owners again failed to comply and the division prepared to initiate legal proceedings to obtain an injunction to allow the City to enter onto the private property to demolish the structure and dispose of related debris at the expense of its owners. However, negotiations conducted during the preparation of the City’s complaint were successful in obtaining the cooperation of the property owners, who voluntarily demolished the fire-damaged structure and removed the debris and other waste from the property at their own expense. (Brad T. Saito)

Rapid Transit Project, Environmental Issues. The division counseled and advised the Rapid Transit Division, Department of Transportation Services, on issues related to the National Environmental Policy Act, the Hawaii Environmental Policy Act (“HEPA”), and related environmental regulatory issues for the Honolulu High-Capacity Transit Corridor Project. The division provided advice and counsel on the application of HEPA and supported the drafting and negotiation of required agreements related to state and federal regulations applicable to park, historic, and archaeological resources potentially affected by the project. (Donna M. Woo, Don S. Kitaoka, Winston K. Q. Wong, Reid M. Yamashiro, Jesse K. Souki, Dawn Takeuchi-Apuna)

Rapid Transit Project, Real Estate Documentation. The division advised and assisted in the preparation of right-of-entry documents for the City’s rapid transit project. These documents were used by the City and its consultants to conduct property survey, environmental field investigation, corrosion control investigation, geotechnical investigation, and/or archaeological investigation on real property that may be impacted by the City’s project. (Winston K. Q. Wong)

Stop Rail Now, et al. v. De Costa, Civil No. 08-1-1605-08 (KKS), First Circuit Court, State of Hawaii. The division represented the City Clerk in a lawsuit brought challenging the Clerk’s decision to reject an initiative petition by Plaintiffs for a proposed ordinance regarding Honolulu mass transit. After an expedited hearing, the Circuit Court granted Plaintiffs’ motion for a preliminary injunction and ordered the Clerk to process the petition under Revised Charter of the City and County of Honolulu (“RCH”) Section 3-404(1) using the definition of “petition” under RCH Section 3-402(1). Plaintiffs filed a motion for partial reconsideration, arguing that the Circuit Court erred in its interpretation of the law and that the Clerk should process the petition under RCH Section 3-404(3). The Circuit Court denied the motion for partial reconsideration. (Reid M. Yamashiro, Don S. Kitaoka, Dawn D. M. Spurlin, Diane T. Kawauchi)

Stop Rail Now, et al. v. De Costa, No. 29354, Intermediate Court of Appeals of the State of Hawaii. The division represented the City Clerk in an action brought in the Intermediate Court of Appeals (“ICA”) related to the City Clerk’s processing of an initiative petition by Plaintiffs for a proposed ordinance regarding Honolulu mass transit. Following the denial of Plaintiffs’ motion for partial reconsideration and a subsequent appeal of the Circuit Court action to the ICA, Plaintiffs filed an emergency motion for preliminary injunction directing the Clerk to place their initiative petition question on the November 4, 2008 general election ballot. After an accelerated briefing schedule and an expedited hearing, the ICA denied the emergency motion because the potential harms to the public’s interests outweighed the injury to Plaintiffs. (Reid M. Yamashiro, Don S. Kitaoka, Dawn D. M. Spurlin)

Response Letter to Campaign Spending Commission. The division responded to a letter from the Campaign Spending Commission (“CSC”) that expressed an opinion that words to the effect of “Top 5 Reasons for Rail” on the honolulutrainsit.org website advocated for an issue, and that if a question regarding rail was certified by the City Clerk to be on the 2008 ballot and the Department of Transportation Services (“DTS”) made expenditures more than \$1,000 between the certification date and November 4, 2008, that DTS would be required to register as a non-candidate committee with the CSC. The letter responded that all of the content on the honolulutrainsit.org website, including words to the effect of “Top 5 Reasons for Rail,” was informational and educational, and cannot be considered “express advocacy,” which would require DTS to register with the CSC. The City’s position was supported with case law from the United States Supreme Court and the Court of Appeals for the Ninth Circuit. The letter also responded that the CSC’s opinion was rather broad and could be struck down as unconstitutionally vague, and supported this with case law from Hawaii and other state jurisdictions. Finally, the City asserted that it must be allowed to inform the public regarding the transit project and to exercise its First Amendment rights by continuing to disseminate information and educate the public regarding rail. (Reid M. Yamashiro)

## **PERSONNEL AND PUBLIC SAFETY SECTION**

Hawaii Government Employees Association, AFSCME, Local 152, AFL-CIO v. Honolulu Emergency Services Division (Grievance of Erik Barnes), Special Proceeding 09-1-0032 (KKS), First Circuit Court, State of Hawaii. The division successfully defended against a Motion to Vacate the Arbitrator’s Award in this proceeding. The case involved a Honolulu Emergency Services Division lifeguard who was terminated, pursuant to a union-employer negotiated Drug and Alcohol Testing Agreement, after he tested positive for a controlled substance on a random drug test and refused to sign a Last Chance Agreement. The union filed a grievance challenging the propriety of the termination and the City prevailed in arbitration. Thereafter, the union filed a Motion to Vacate, Modify, Correct and/or Clarify the Arbitrator’s Award arguing that there had been fraud on the part of the City, evident partiality and misconduct by the Arbitrator, and the Arbitrator exceeded the scope of his authority. The City opposed the motion asserting that the union failed to provide any evidence to support its baseless contentions regarding fraud and arbitrator misconduct, that the arbitrator acted within the scope of his authority in ruling in the City’s favor, and that the union was impermissibly re-arguing its case to the Circuit Court. The hearing on the union’s motion was held on April 14, 2009 before the Honorable Karl K. Sakamoto. Judge Sakamoto agreed with the City on all points, denied the union’s Motion to Vacate and thereby confirmed the arbitration award. (Elisabeth A. K. Contrades)

In the Matter of the Arbitration between the United Public Workers and the City and County of Honolulu. Grievant was disciplined for 15 days by the department for workplace violence for yelling, approaching a co-worker, and initiating a bump with his chest and stomach. The arbitration hearing lasted seven days. In the Decision and Award dated October 27, 2008, the arbitrator mitigated the discipline to ten days. Of significance is that the Department was found to have complied with the criteria imposed by Arbitrator Carroll R. Daugherty for industrial due process for just cause in imposing the discipline on Grievant. (John S. Mukai)

In the Matter of the Appeal of James Arciero, et al. before the Civil Service Commission. In this appeal, 13 Fire Department Battalion Chiefs, excluded managers, claimed that the City and County of Honolulu allegedly violated Hawaii Revised Statutes Section 89C-3 by not providing them the opportunity to participate in a "Rank for Rank" pilot program which was part of the Unit 11 Bargaining Agreement. The hearing on the appeal commenced on August 28, 2007 and continued monthly until June 24, 2008. The Commission, via its Findings of Fact, Conclusions of Law and Order dated February 24, 2009, found in favor of the City and denied the appeal. There has been an appeal of the Commission's order, and the matter is currently before the Honorable Eden E. Hifo in the First Circuit Court. (John S. Mukai, Elisabeth A. K. Contrades)

Civil Service Appeal Challenging the Selection Process for Assistant Director, Department of Human Resources. With the assistance of special counsel due to a conflict with representation by the Department of the Corporation Counsel, the division defended the Department of Human Resources ("DHR") in its selection of the assistant director for the department. In January 2003, DHR elected to fill its assistant director position by an open-competitive recruitment process for the stated purpose of having as large a pool of applicants as possible. The open-competitive process that was permitted under the department's administrative rules invited applicants from both existing City personnel and individuals from the public. In selecting the assistant director in an open-competitive recruitment process, no preference was afforded to an applicant's current City civil service status. The selection process was challenged by two civil service employees in an appeal filed with the Civil Service Commission in February 2004 that concluded with a Civil Service Commission decision dated August 30, 2005, denying the appeal in its entirety. The decision was appealed to the Circuit Court that resulted in an order of remand to the Civil Service Commission for more detailed findings of fact and conclusions of law. On remand, the Civil Service Commission entered its denial of the appeal in its entirety by decision dated July 25, 2006. The Civil Service Commission decision was appealed a second time to the Circuit Court that again concluded with an order of remand to the Civil Service Commission to afford the parties an opportunity to comment upon the proposed decision of the Commission before its adoption in accordance with the Hawaii Administrative Procedure Act, Chapter 91, Hawaii Revised Statutes. The Civil Service Commission thereafter entered its decision denying the appeal in its entirety on July 24, 2007. In the third appeal to the Circuit Court, the Court affirmed the July 24, 2007 decision of the Civil Service Commission by decision dated and judgment entered on July 23, 2009. (Diane T. Kawauchi)

Aveiro v. City and County of Honolulu and City and County of Honolulu Police Commission, Civil No. 08-1-0410-02, First Circuit Court, State of Hawaii. The division successfully represented the City and the Honolulu Police Commission in this administrative appeal to the Circuit Court. The decision in this appeal brought to a conclusion 13 years of litigation and administrative proceedings arising out of former Assistant Police Chief Joseph Aveiro's request to the Police Commission to require the City to pay for his legal representation in civil cases brought against him, other individuals and the City by Ms. Sharon Black, alleging sexual harassment and related claims. This appeal was the third appeal of denial of representation by the Police Commission, the first two appeals (in 1998 and 2002) having resulted in remands requiring further Police Commission proceedings. Division attorneys succeeded in persuading the Court that procedures followed by the Police Commission did not deny due process, that the evidence in the record was sufficient to support the Commission's decision to deny representation, and that the matter should be brought to an end. (Tricia M. Nakamatsu, Gordon D. Nelson)

## **LITIGATION DIVISION**

The Litigation Division consists of ten attorneys: a division head, and nine trial attorneys, one of whom is presently deployed to Kuwait. The division is supported by thirteen support staff which includes a supervisor, three paralegals, four legal clerks, one senior clerk typist, and four messengers.

The Litigation Division represents the City before all of the state and federal courts in the State of Hawaii, including the two appellate Courts of the State of Hawaii, the United States District Court for the District of Hawaii, the Ninth Circuit Court of Appeals, and the Supreme Court of the United States. The division processes and litigates all claims by or against the City<sup>1</sup>, seeks collection of monies owed to the City, and handles Subpoenas Duces Tecum directed to the Honolulu Police Department (HPD).

In addition to tort claims, the Litigation Division handles claims relating to contracts, construction, civil rights, natural resources, employment issues and other non-tort related matters.

## **Statistics**

During the 2008-2009 fiscal year, the Litigation Division handled a great number of cases against and for the City, including active lawsuits as well as pre-lawsuit claims, as set forth below:

Pending cases as of June 30, 2008: .....	3,061
Number of cases completed:.....	2,230
Number of cases opened:.....	969
Pending cases as of June 30, 2009: .....	1,800

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<sup>1</sup>The cases specified in this subsection are not a comprehensive listing of all cases handled by the Litigation Division and are merely offered as a representative sample of the types of matters assigned to the division.

## Highlights and Accomplishments

### Lawsuits

As in previous years, the Litigation Division continues to be involved in personal injury and civil rights actions filed against the City, its departments and its employees. During the past year, the division took eight cases to trial<sup>2</sup> and filed dispositive motions in a number of other cases. The division was successful in these trials and in the majority of the motions. Following is a brief summary of several of the cases successfully completed by the division in the past year.

Bartolome v. City and County of Honolulu, et al., United States District Court for the District of Hawaii. Plaintiff filed a lawsuit against the City and several police officers alleging that police used excessive force to affect an arrest without provocation, throwing him to the ground and punching him in the back. This lawsuit arose out of an incident on March 31, 2004, when Plaintiff “popped a wheelie” on his motorcycle while riding westbound on the H-1 Freeway, attracting the attention of HPD officers who were riding police motorcycles and assigned to solo bike patrol. After observing this moving violation by Plaintiff, the police officers activated their lights and sirens, and pulled alongside Plaintiff and gestured for him to pull over. Instead of pulling over, Plaintiff increased his speed violently and sped off, attempting to flee from the officers on his Ducati motorcycle. After approximately six days of trial, the jury returned its verdict in favor of the City and its officers. (D. Scott Dodd, Richard D. Lewallen)

Rivers v. City and County of Honolulu, et al., United States District Court for the District of Hawaii. This case originally was filed as part of Sheryl Sunia, Sharolyn Rodrigues-Wong, Christopher Fontanilla, and Alan Rivers v. City, et al. on February 13, 2006. On November 3, 2008, the Court ordered trifurcating the case and Alan Rivers filed his complaint on November 12, 2008. Alan Rivers was hired on August 16, 1989 as a recruit. After completing and graduating from the training program, he received his Police Officer's Commission, successfully graduated from the Field Training Officer Program, and was assigned to the Patrol Division on or about March 1990. On or about March 18, 2003, Plaintiff was in line-up, also known as a pre-shift briefing. Lieutenant Alan Anami, during the course of the briefing, made a sexual remark. After the March 18, 2003 line-up dispersed, Plaintiff informed his immediate supervisor that he wanted to file a complaint against Lieutenant Anami for making a statement which violated Defendant's sexual harassment policy. Plaintiff alleged sexual harassment, civil rights violation, and intentional infliction of emotional distress. After approximately five days of trial, the jury returned its verdict in favor of the City and HPD. (Tracy S. Fukui, Curtis E. Sherwood, Darren M. Suzuki)

The division also successfully settled several motor vehicle accidents, flooding, sewage, and personal injury cases in which negligence was alleged against the City.

Motor Vehicle Accident Cases: Niupulusu v. City, Wilson v. City, Fellezs v. City

Flooding cases: Bunyan v. City, Landmark, et al. v. City

Sewage cases: Ishikawa v. City, Peterson v. City

Personal injury cases: Flores v. City, Becker v. City, Wall v. City

The division successfully obtained summary judgments in Gibo v. City and Smith, James E. v. City, two civil rights cases; consolidated cases Singleton v. City, Gonzales v. City, and Herring v. City, and Kaneshiro v. City, personal injury cases.

The division was also successful in obtaining dismissal of the complaints filed in Reeber v. City, a wrongful termination, discrimination and breach of duty case, as well as in Rutledge v. City and Kernan v. City, two civil rights cases.

The division was successful in two cases in the appellate courts. In Smith, Gardner v. City, a civil rights case, the Court dismissed the amended complaint, Plaintiff appealed to the Ninth Circuit Court of Appeals and the Appellate Court rejected the petition. In Harrell v. City, the Supreme Court of the United States denied the petition for writ of certiorari.

The division is currently defending the City in several high profile police cases (Simms v. City, Black v. City, Faaita v. City, and Torres v. City); several motor vehicle accident and road design cases (Cordeira v. City, Vinsh v. City, Kobashigawa v. City, Nishibata v. City, Meyer v. City, Makinney v. City, et al., Sabado v. City, et al., and Nguyen v. City, et al.); and numerous negligence claims (Wolfe v. City, Leong v. City, Stevens v. City, Morris v. City, and Herrington v. City).

The division is working with the Counseling and Drafting Division in Carstairs v. City, and Alline, Inc. v. City, et al., both breach of contract cases.

The division has also taken the lead in defending the City in several non-traditional tort cases alleging improper employment practices, sexual harassment, workplace violence, whistleblower claims, and retaliation (Olipares v. City, Bentzien v. City). The division has taken on the task of representing City officials who have been sued in their individual capacity for alleged acts or omissions arising out of their employment with the City (Whang v. City, Black v. City, Siu v. City).

### State Legislation

The Litigation Division also continued with its advocacy of legislation favorable to the City by drafting proposed bills and testimony regarding tort reform, governmental immunity, and governmental tort claim procedures. This past year, the division took an active role in its advocacy of legislation by testifying before numerous House and Senate Committees regarding various proposed bills that directly impact the City.

### REAL PROPERTY TAX DIVISION

The Real Property Tax (RPT) Division is comprised of two attorneys. They are assisted by two support staff.

The RPT Division maximizes intake of real property assessment revenues to the City by efficiently managing cases and vigor-

<sup>2</sup>This includes one trial in the Honolulu District Court and five trials in Small Claims Court.

ously defending the City against real property tax appeals brought in Tax Appeal Court (TAC). On occasion, the RPT Division also defends the City against appeals brought before the Board of Review (BOR).

The RPT Division provides legal advice and support to the Real Property Assessment Division (RPAD), the Treasury Division, and the Department of Budget and Fiscal Services (BFS), as necessary to supplement the Counseling and Drafting Division's functions. Also, the RPT Division assists the RPAD in drafting and implementing procedures and proposed legislation that will support assessments and resolve disputed legal issues.

The RPT Division coordinates and works with the other counties in developing appraisal procedure and legislation, as well as litigation practices through the ongoing exchange of information and support of legal positions on common issues.

The RPT Division continues to build good working relationships with the TAC Judge and court personnel, while implementing office and court procedures to streamline prompt resolution of cases. The RPT Division continues to obtain information about properties through discovery in court cases to assist the RPAD and to optimize the assessment process, and uses the City's private consultant/appraiser for appraisal training and litigation support.

## **Statistics**

During FY 2009, in resolving appeals before the TAC, the RPT Division recovered about \$1.4 million in total taxes and approximately \$1.2 million above the tax amounts claimed by the appellant taxpayers.

For the fiscal year, the RPT Division opened 28 new appeals and received 78 assignments, had a previous workload of 268 appeals and assignments, and completed and closed 160 appeals and 10 assignments. Additionally, the RPT Division received about four to six informal requests per week from the RPAD for advice and other assistance.

## **Highlights and Accomplishments**

### **Appeals and Related Matters**

Thomas A. Marzec v. City and County of Honolulu, No. 28287, Intermediate Court of Appeals (ICA). The RPT Division prevailed in this appeal, in which the Appellant challenged the dismissal of his tax appeal, which was submitted to the BOR by facsimile transmission after the close of business on the last day for filing. The ICA, ruling in favor of the City, held that based on the applicable ordinance and rules, Appellant was not entitled to lodge or file the appeal of his real property tax assessment by means of a facsimile transmission.

Garry P. Smith and Earl F. Arakaki, et al., v. City and County of Honolulu, et al., T.A. No. 07-0099 Consolidated (Other Civil Action). The RPT Division prevailed on summary judgment against plaintiffs, who had filed suit against the City, the State of Hawaii, and the counties of Kauai, Maui and Hawaii, alleging that the real property tax exemption granted to lessees of Hawaiian Homestead lands was racially discriminatory and therefore unconstitutional. The Court ruled the exemption was valid because it is not based on race.

Tax Appeal of Elizabeth Dailey and Michael Dailey, Case Nos. 05-0085 and 05-0086 (Consolidated). At the request of the TAC, the RPT Division presented oral argument on the issues in this case, which originally went to trial in 2007. At issue was the appropriateness of size adjustments made in the City's 2006 assessment of the Dailey Estate, consisting of two agricultural-zoned beachfront parcels in Mokuleia. A decision is pending.

### **Other Matters**

During the fiscal year, the RPT Division provided advice and assisted on a variety of other matters such as:

Real Property Tax Relief. The RPT Division opined regarding the legal ramifications of proposed tax relief legislation, monitored for legality the tax relief bills introduced in the City during the first half of 2008, and testified at City Council hearings when necessary. The RPT Division was instrumental in drafting bills creating a homeowner's class and an exemption for nonprofit and for-profit group child care centers.

FOIA Inquiry. The RPT Division, in conjunction with deputies from the other counties, organized a unified response to requests made pursuant to HRS Chapter 92F for public documents evidencing real property tax refunds.

HSBA Mid-Year Conference 2009. The RPT Division delivered a Continuing Legal Education presentation to the legal community on the topic of "Efficiency: Proper Procedures and Filings for Real Property Tax Appeals." The program participants discussed the applicable law, and the proper way in which to complete BOR and TAC forms relevant to the appeal process. The presentation culminated in a question-and-answer session.

2009 Statewide Board of Review Conference. The RPT Division assisted the RPAD in planning the agenda for the statewide annual conference of the boards of review for each county, held at the Best Western Plaza Hotel. This involved coordinating presentations with representatives of each county and conducting a legal question and answer forum.

Tax Foreclosure Sale. The RPT Division assisted and advised BFS in foreclosing on properties for which real property taxes had not been paid, and in selling those properties to enforce the City's paramount lien.

Leasing of City-Owned Real Property. The RPT Division assisted and advised BFS and other departments on issues arising from the leasing of City property to commercial tenants, including the drafting of new lease provisions and the collection of delinquent real property taxes.



**HONOLULU ETHICS COMMISSION\***  
**Charles W. Totto, Executive Director and Legal Counsel**

**Mission**

The purpose of the Ethics Commission (Commission) is to ensure that City officers and employees understand and follow the standards of conduct governing their work for the public. The Commission's main focus is on conflicts of interest and the misuse of government resources or positions. The Commission implements its objectives through a balance of training programs, advisory opinions, enforcement actions and legislation.

To find out more about the Commission and its activities, visit the Commission's web site at [www.honolulu.gov/ethics](http://www.honolulu.gov/ethics). The web site has information about the Commission's meetings, procedures, the standards of conduct, and useful ethics guidelines for the public, and City employees and officers.

**Resources**

The seven Commission members are appointed by the mayor and confirmed by the City Council. Commissioners serve staggered five-year terms. The members in FY 2008 were:

	<u>Term Expiration</u>
Lex R. Smith, Esq., Chair.....	December 31, 2011
Susan H. Heitzman, Vice Chair.....	December 31, 2010
Matthew H. Kobayashi.....	December 31, 2009
Wayne T. Hikida .....	December 31, 2009
Patricia Y. Lee, Esq.....	December 31, 2010
Geri Marullo.....	December 31, 2011

The Commission was staffed with an executive director/legal counsel and a legal clerk. The Commission's budget for FY 2009 was \$213,786.

**Ethics Training**

The Commission staff continued the mandatory ethics training program for all elected officials, managers, supervisors and board and Commission members. Honolulu's mandatory ethics training program is one of the most ambitious in the United States. In FY 2009, the Commission trained 400 City officials, bringing the total to over 4,500 public servants trained since the law was enacted. In addition, the Commission staff presented its "Ethics Checklist" orientation training to 446 new City officers and employees. As a result, all of the current City officials and more than half of the City's workforce have received some form of ethics training.

Last year the Commission introduced a mandatory ethics refresher course for all elected officials, supervisors, managers and board and Commission members. This year 232 attended, bringing the total receiving retraining to 1,012.

Some agencies take advantage of the training beyond those who are mandated to attend. For example, all mayor's office and council staff, emergency medical services personnel, City attorneys and fire department recruits also attend ethics training.

Training programs continue to greatly reduce the number of unintentional ethics violations. In addition, these programs should increase public confidence in City employees and officers.

**Advice and Enforcement**

In the past fiscal year, the Commission received 367 requests for advice and complaints regarding City personnel. By the end of FY 2009, the Commission had responded to 332 of these requests. The Commission also received and reviewed 446 financial disclosure statements from high-level City officials.

Also in FY 2009, the Commission began investigating 77 complaints of unethical conduct by City personnel. This was 2.5 times the number of complaints investigated in 2006. This shows that the public and City workers will report misconduct and believe that the Commission offers a fair and effective forum to examine their concerns.

The Commission rendered advisory opinions in the following cases:

- The Commission recommended suspension without pay for a supervisor who, on a regular basis, misused his City truck for his personal benefit and allowed someone who was not a City employee to park in the City's parking lot and ride in the City truck. The misconduct was prohibited under Section 11-104, Revised Charter of Honolulu (RCH), which prohibits the use of taxpayer funds for non-City projects or purposes. Advisory Opinion No. 2008-3.
- The Commission conducted several investigations into alleged misuse of City paid time by City officials for political campaign purposes, which is prohibited by RCH Section 11-104. No significant violations were found. In fact, City employees took time off from their City work and other precautions so that they would not violate the ethics laws when they conducted political activities. Advisory Opinion No. 2009-1.
- In a related case, the Commission further clarified prohibited campaign practices. The Commission recommended, and the City Clerk has adopted the recommendation, that no employee of the City Clerk's Office should be requested or urged while working in their City job to sign a candidate's petition for nomination. Advisory Opinion No. 2008-4.

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\*The Ethics Commission is attached to the Department of the Corporation Counsel for administrative purposes only.

- The Commission found that an elected officer misused City resources for personal benefit by having the official's City web site link to his political web site, in violation of RCH Section 11-104. The Commission did not recommend any discipline because the mistake was inadvertent and corrected upon notification. Advisory Opinion No. 2008-5.
- The Commission determined that there was no conflict of interest for members of the Neighborhood Commission who were also neighborhood board members when they voted on a proposal to have neighborhood board elections conducted by online voting. Advisory Opinion No. 2009-2.
- An employee who was a witness to alleged misconduct by the City retained a witness fee for testimony at trial even though the case settled and the employee did not appear or testify at trial. The Commission held that keeping the witness fee constituted a violation of RCH Section 11-102(d), which prohibits a City officer or employee from receiving compensation other than City pay for doing one's city duties. Advisory Opinion No. 2009-3.

## **Legislation**

A charter amendment to broaden the Commission's authority to impose civil fines for misconduct on City officials with significant fiscal or discretionary authority passed in the November ballot. To carry out the voters' mandate, Ordinance 09-9 became law in June, 2009.

Along with the ethics boards of the other counties, the Commission supported the introduction of bills at the legislature to clarify that state law does not prohibit ethics agencies from imposing civil fines on City officials. These bills failed without discussion, but will be advanced again in the 2010 legislative session.